Petition

81-1175

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No. ....

IN THE

Supreme Court of the United States

October Term, 1981

INTERNATIONAL MEDICATION SYSTEMS, LTD.,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Question Presented

Whether the Ninth Circuit Court of Appeals abused its discretion when it remanded that portion of the case relating to the alleged violation of §8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. §158(a)(1) and (3) (''Act'' or ''NLRA''), for the taking of additional evidence, but did not remand that portion of the case relating to an alleged independent violation of §8(a)(1) of the NLRA when the National Labor Relations Board (''Board'') relied on the same series of facts in finding both the §8(a)(3) and (1) violation as well as the independent §8(a)(1) violation?

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Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petitioner International Medication Systems, Ltd. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 2, 1981.

Opinions Below.

The opinion of the Court of Appeals is reported at 640 F.2d 1110 (9th Cir. 1981) and appears as Appendix A hereto. The Court's denial on August 17, 1981, of the petitioner's motion for rehearing appears as Appendix B hereto. The Court's denial on September 18, 1981, of the respondent's motion for rehearing appears as Appendix C hereto. The decision and order of the National Labor Relations Board, enforced in part and remanded in part by the Court of Appeals, is reported at 244 NLRB No. 136 (1979),

and appears as Appendix D hereto. The decision of the Administrative Law Judge in this case appears as Appendix E hereto.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 2, 1981. Petitioner's timely petition for rehearing was denied on August 17, 1981. Respondent's timely petition for rehearing was denied on September 18, 1981, and this petition for certiorari is being filed within 90 days of that date. This Court's jurisdiction is being invoked under 28 U.S.C. §1254(1).

Statutory Provisions Involved.

United States Code, Title 29:

> Section 158(a) It shall be an unfair labor practice for an employer — (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

Statement of the Case.

This case involves an order of the Board, enforced in part by the Court of Appeals, requiring the petitioner to post a notice stating that it violated the NLRA and promising to take specified remedial action. The case arose in the context of charge filed with the Board alleging, in part, that petitioner violated the NLRA by discharging two employees, Lavendera and Gurman, for engaging in union activities.

During its investigation, the Board served a broad subpoena on petitioner requiring it to produce a number of

corporate records. Petitioner refused to comply with several portions of the subpoena because it was both overly burdensome and sought the introduction of evidence not relevant to the case. At the hearing, the Administrative Law Judge (''ALJ'') ruled that because the petitioner refused to comply fully with the subpoena, the respondent would be permitted to use secondary evidence to establish matters sought to be proved by the introduction of the subpoenaed materials. The ALJ further ruled that the petitioner would be prohibited from presenting any evidence to the contrary and could not cross examine witnesses with respect to the secondary evidence. As a result of the evidence presented, the ALJ held that the petitioner violated Section 8(a)(1) because it interfered with union activities and Sections 8(a)(3) and (1) because it discharged Lavendera and Gurman.

A three-member panel of the Board adopted the decision and order of the ALJ as the Board's order.

A panel of the Ninth Circuit Court of Appeals found there was evidence to support the Board's finding that petitioner violated Section 8(a)(1) by interfering with union activities. The court also found that rebuttal evidence which petitioner was improperly barred from offering at the hearing might have changed the result in the §8(a)(3) and (1) charge and remanded that portion of the case to the Board for further proceedings. In so finding, the court relied in part on the conduct of petitioner's supervisors. The Board found that the conduct of these same supervisors resulted in the Section 8(a)(1) violation.

REASONS FOR GRANTING THE WRIT.

I.

The Ninth Circuit Court of Appeals Abused Its Discretion When It Remanded That Portion of the Case Relating to the Alleged Violation of §8(a)(3) and (1) of the Act for the Taking of Additional Evidence, but Did Not Remand That Portion of the Case Relating to an Alleged Independent Violation of §8(a)(1) of the Act When the Board Relied on the Same Series of Facts in Finding Both the §8(a)(3) and (1) Violation as Well as the Independent §8(a)(1) Violation.

In *Gasoline Products Co. v. Chaplin Refining Co.*, 283 U.S. 495 (1931), this Court held that where local practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice. There, the question of damages on the counterclaim was so interwoven with that of liability that the former could not, consistent with notions of fair play and due process, be submitted to the jury independently of the latter without confusion and uncertainty.

Petitioner submits that a substantial unfairness befalls it as a result of the Ninth Circuit's partial remand on the §8(a)(3) and (1) allegations due to the ALJ's impermissible imposition of evidentiary sanctions when the court there did not also remand the issue regarding the independent §8(a)(1) violations. Petitioner submits that the charges under Section 8(a)(1) of the Act are so intimately and inextricably connected with the charges under Section 8(a)(3) and (1) of the NLRA, 29 U.S.C. §158(a)(3) and (1), that insofar as the Ninth Circuit remanded the Board's Order with respect to the §8(a)(3) and (1) charges to the Board for the purpose

of taking additional evidence, the court should have similarly remanded rather than enforced the Board's order with respect to the §8(a)(1) charges. That this should be so can be clearly ascertained from the fact that the Ninth Circuit relied on conduct at issue with the §8(a)(3) charges, to wit, the conduct of Ruiz and Chai, in upholding the Board's order with respect to the Section 8(a)(1) charges. The reliance on this conduct indicates that the independent §8(a)(1) violation was in fact at least partially derivative of the Section §8(a)(3) and (1) violations. A finding of the independent §8(a)(1) violation therefore rested in part upon evidence adduced by the General Counsel for the Board in support of the §8(a)(3) allegations, but as a result of the impermissible evidentiary sanctions imposed by the ALJ, remained unrebutted by Petitioner.

By remanding on the portion of the Board's order dealing with the §8(a)(3) and (1) allegations, the Ninth Circuit's decision will allow Petitioner to rebut the evidence propounded by the General Counsel for the Board on the §8(a)(3) and (1) allegations. The same evidence, however, would tend to rebut the General Counsel's §8(a)(1) allegations. Because the Ninth Circuit enforced rather than remanded the §8(a)(1) allegations, Petitioner will be, absent this Court's intervention, denied the right to present that evidence to rebut the allegations as to the §8(a)(1) charges.

As in *Gasoline Products Co., supra,* the issues involving the §8(a)(3) and (1) as well as the independent §8(a)(1) allegations are inextricably intertwined. In *Williams v. Slade,* 431 F.2d 605, 608 (5th Cir. 1970), interpreting *Gasoline Products Co.,* the court observed that

> [a] partial new trial should not be resorted to unless no injustice would result. . . . A court may properly award a partial new trial only when the issue affected by the error could have in no way influenced the verdict

> on those issues which will not be included in the new trial. If the decision on the other issues could *in any way* have been affected by the error, then a new trial must be had on all issues. (Emphasis added).

And in *Geffen v. Winer*, 244 F.2d 375 (D.C. Ct. App. 1957), the court noted that its power to order partial remand "... is to be exercised with caution and not when the error which necessitates a new trial is in respect of a matter which might well have affected the jury's determination of other issues."

The underlying rule to be gleaned from these cases is that the court in each thought as a result of the totality of the circumstances that the issues sought to be excluded by a partial new trial had not been properly determined initially even though the obvious error complained of related to the other issue or issues. Here, the Ninth Circuit's decision would allow petitioner to adduce evidence to rebut the General Counsel's §8(a)(3) and (1) case but would at the same time foreclose it from using the same evidence to properly rebut the independent §8(a)(1) violation. Petitioner should have the opportunity to adduce this evidence to rebut both the §8(a)(3) and (1) as well as §8(a)(1) allegations.

This result should obtain especially where, as here, the Board improperly prevented the petitioner from adducing evidence relevant to both the §8(a)(3) and (1) and independent §8(a)(1) allegations. The Ninth Circuit's decision to remand only a portion of the Board's order in effect denies petitioner the right to confront and cross-examine adverse witnesses and runs contrary to this Court's pronouncements on the aspect of procedural due process that must be adhered to even in regulatory and administrative hearings. *Green v. McElroy*, 360 U.S. 474 (1959). With specific application to Board hearings, the courts have held that the Board denies a respondent due process of law when the Board prevents

the respondent from fully litigating issues before the ALJ and then finds respondent's conduct violative of the Act. In *NLRB v. Blake Construction Co.*, ____ F.2d ____ (D.C. Ct. App. 1981), 108 LRRM 2140, the court noted that "the Board may not make findings or order remedies of violations not charged . . . or litigated in a subsequent hearing." Here, while the petitioner was charged with the independent §8(a)(1) violation, it was denied the right to fully litigate the issues raised in the charge by being denied the right to produce rebuttal evidence. Having remanded the §8(a)(3) and (1) allegations because of the effect of the impermissibly imposed evidentiary sanctions on the petitioner's presentation of its case, the Ninth Circuit should have also remanded the portion of the Board's Order dealing with the §8(a)(1) allegations.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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A Professional Corporation,
Counsel for International Medication Systems, Ltd.

Appendix

APPENDIX A.

National Labor Relations Board, Petitioner, v. International Medication Systems, Ltd., Respondent. No. 79-7584.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Oct. 15, 1980. Decided April 2, 1981. As Corrected April 8, 1981.

Susan Mandle, Atty., NLRB, Washington, D. C., for petitioner.

Lee T. Paterson, Palos Verdes Estates, Cal., for respondent.

On Application for Enforcement of an Order of The National Labor Relations Board.

Before WRIGHT, KENNEDY and ALARCON, Circuit Judges.

EUGENE A. WRIGHT, Circuit Judge:

The Board seeks enforcement of its order directing the respondent to cease and desist from unfair labor practices and to reinstate two employees with back pay. 244 NLRB No. 136 (1979).

In 1978 Lavendera and Guzman led an effort to secure union representation for the respondent's employees. During that effort, several company supervisors communicated with employees about the consequences of involvement in union activity. Lavendera and Guzman were ultimately discharged.

An administrative law judge and the Board concluded that the respondent interfered with union activity and discharged the two employees in violation of § 8(a)(1) & (3) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(a)(1) & (3).

In determining that the dismissals were discriminatory, the Board relied on secondary evidence of the respondent's

policy toward absenteeism and layoffs introduced by the general counsel after the respondent refused to produce subpoenaed personnel records. No effort was made to seek enforcement of the subpoena in district court. Instead, the administrative law judge barred the respondent from rebutting the general counsel's evidence on these issues by cross-examining witnesses or presenting other evidence.

We review the sufficiency of the evidence and the propriety of the sanctions imposed by the administrative law judge.

I.

The Board found that the respondent interfered with, restrained, and coerced employees engaged in union activity, in violation of NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1), by interrogating and threatening them, creating the impression of surveillance, and otherwise creating a coercive atmosphere.

These findings must be upheld if supported by substantial evidence on the record considered as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 485-87, 71 S.Ct. 456, 463-464, 95 L.Ed. 456 (1951).

Company supervisors Ruiz, Aparicio, Chai, and Hinderer asked numerous questions of employees about union activities and the identity of union leaders and supporters. These were coupled with express or implied threats of reprisal. Viewed separately or as a pattern, they could fairly be interpreted as tending to interfere with protected activity. *See NLRB v. Silver Spur Casino*, 623 F.2d 571, 584-85 (9th Cir. 1980) (NLRA § 8(a)(1) is violated by questions that can fairly be interpreted as threats); *NLRB v. Hotel Conquistador, Inc.*, 398 F.2d 430, 434 (9th Cir. 1968) (statements that create the impression of surveillance are unlawful).

Aparicio, Hinderer, and Contreras made other statements about the probable firing of union supporters which could fairly be interpreted as threats of reprisal. Hinderer and Contreras directly or indirectly threatened that the company would close if the union prevailed. *See NLRB v. Prineville Stud Co.*, 578 F.2d 1292, 1295 (9th Cir. 1978) (threat to close a plant unless union activity ceases is unlawful).

The respondent contends that Contreras was not a supervisor and that her actions were not attributable to it. We need not resolve that question.[1] Even if the actions of Contreras may not be imputed to the respondent, there is abundant evidence of interference, restraint, and coercion. We grant enforcement of the Board's order that the respondent cease and desist from interfering with union activity and post an appropriate notice.

II.

The Board found that the respondent dismissed Lavendera and Guzman in retaliation for their union activities, in violation of NLRA § 8(a)(1) & (3), 29 U.S.C. § 158(a)(1) & (3).

In connection with this question, the Board issued a subpoena duces tecum calling for production of personnel records for all employees which would show hiring, firing, and layoff practices and actual treatment of absenteeism.

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[1]Contreras was a "lead person," and in another setting, "lead persons" who were deemed "low-level" supervisors were held not to speak for the company in the absence of other antiunion activity. *Hecla Mining Co. v. NLRB*, 564 F.2d 309, 315 (9th Cir. 1977).

But an employer is properly held responsible for anyone acting as its agent when employees could reasonably believe that the agent was speaking for the employer. *NLRB v. Pacific Southwest Airlines*, 550 F.2d 1148, 1150 (9th Cir. 1977).

Contreras acted in the context of other antiunion activity by persons whose supervisory status is undisputed, unlike the "lead persons" in *Hecla Mining Co.* Under these circumstances, employees might reasonably have believed that she was speaking for the respondent.

The respondent complied with the portion of the subpoena calling for the records of Lavendera and Guzman, and other materials, but refused to comply with the portion calling for records of employees not within the bargaining unit. It contended that these were irrelevant. Its petition to revoke the subpoena was denied, but the general counsel did not seek enforcement of the subpoena in district court and the preclusion order followed.

A. *Nature of evidence admitted and excluded*

1. *Discharge of Lavendera*

Lavendera was a leader of the organizing effort. Prior thereto, the company had trained her and taken steps to ensure that she would continue to be available. Before a union meeting at her home on April 6, she received assurances that she would have her anniversary raise and was told that her services were needed.

April 7, the day after the union meeting, was the turning point in Lavendera's relationship with the respondent. Her value to the company apparently evaporated. Her supervisor, Chai, asked another employee about her involvement with the union, implying that he would retaliate. The administrative law judge credited Lavendera's account of her discussion with Chai in which she said he told her, on the morning of April 7, that he would find an "excuse" to discharge her "after lunch." That afternoon, she was discharged. At least one supervisor said that Chai dismissed her for union activity.

Chai maintained that Lavendera was "laid off" because her services were no longer needed. The general counsel introduced evidence that no one else was let go that day and that layoffs at the company normally occurred en masse.

The administrative law judge did not allow the respondent to rebut this evidence.

"A discharge for which the employer has a justifiable ground" nevertheless violates the statute "if it is in fact motivated by antiunion sentiment." *L'Eggs Products, Inc. v. NLRB*, 619 F.2d 1337, 1341 (9th Cir. 1980). When motives are mixed, "the improper motive must be shown to have been *the dominant one*" *Id.* (quoting *Western Exterminator Co. v. NLRB*, 565 F.2d 1114, 1118 (9th Cir. 1977) (emphasis added in *L'Eggs*)).

In *L'Eggs*, an employee was dismissed "very soon after L'Eggs received reports that [she] was interested in unions and would support a union . . . at L'Eggs." *Id.* at 1342. There was "little doubt" that she was "a poor employee, and could have been fired for that reason." *Id.* at 1343. But there was substantial evidence, in view of inquiries by supervisors about her union activities and the timing of her discharge, that the dominant reason was her union acitivity. *Id.* at 1343-44.

There is no suggestion that Lavendera was not a good employee. Her services were valued by the company until she held a union meeting in her home. Then she became expendable. Even if other layoffs occurred contemporaneously, this one might still fairly be interpreted as retaliation.

Nevertheless, it is possible that similar or contemporaneous layoffs of employees with comparable training and value to the company would have established, under the circumstances, that the business reason given for Lavendera's discharge was not pretextual and that antiunion motivation was not dominant. The secondary evidence, which shows that Lavendera was the only employee laid off on April 7 and that layoffs normally occurred en masse, elim-

inates this possibility. This evidence is therefore essential to the Board's finding that Lavendera's discharge was improperly motivated.

2. *Discharge of Guzman*

Guzman took two weeks' vacation and one week's leave of absence in July 1978. She knew that one day of her vacation, Independence Day, was a paid holiday and that company policy was to extend vacations one day under such circumstances. She believed that her total time off would be three weeks and one day.

The respondent had reduced her leave of absence by one day, however, and when she did not return to work after three weeks, she was "terminated." No one telephoned her first, and she had previously received only one oral and one written warning for tardiness.

The general counsel's evidence showed that other employees had missed one or more days without notifying the company and had not been discharged, and that company policy permitted two unexcused absences before dismissal. Again, the respondent was not permitted to rebut the evidence because it had refused to produce personnel records that presumably would have resolved the issue.

Refusal to give a day off when an employee was hired with the understanding that she could take occasional days off and had been allowed to do so before her union involvement was held to be an unfair labor practice in *NLRB v. Sacramento Clinical Laboratory, Inc.*, 623 F.2d 110, 113 (9th Cir. 1980).

Nevertheless, the respondent might be able to rebut this evidence of improper motive by establishing that Guzman did not receive disparate treatment. *See NLRB v. Best Products Co., Inc.*, 618 F.2d 70, 72, 74 (9th Cir. 1980). In *Best Products*, the employee was "frequently absent from

work." *Id.* at 72. The court upheld the administrative law judge's finding that, although the company's action in suspending the employee for two months may have been harsh, it did not represent disparate treatment and was proper. *Id.* at 72, 74. Here, the secondary evidence established that Guzman received disparate treatment.

B. *Effect of preclusion order*

Because the secondary evidence is essential to the Board's findings that Lavendera and Guzman were improperly discharged and rebuttal evidence might have changed the result, we must determine the propriety of the preclusion order.

When the respondent refused to comply with the subpoena, the general counsel could have sought judicial enforcement. Section 161(2), 29 U.S.C., confers jurisdiction on the district courts to enforce NLRB subpoenas through contempt penalties.

The district court will enforce an agency subpoena "if the investigation is legitimate, the subpoena is not needlessly broad, and the records sought are relevant to the inquiry." K. Davis, *Administrative Law* § 3.08 at 67 (3d ed. 1972). *See United States v. Morton Salt Co.*, 338 U.S. 632, 652, 70 S.Ct. 357, 368, 94 L.Ed. 401 (1950); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208, 66 S.Ct. 494, 505, 90 L.Ed. 614 (1946).[2]

The Board contends that the subpoenaed records were "clearly relevant to major issues in the case." There is no

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[2]The district court "may undertake only an extremely limited inquiry" in deciding whether to enforce the subpoenas. *NLRB v. Frederick Cowan & Co., Inc.*, 522 F.2d 26, 28 (2d Cir. 1975). "[T]he agency need not even show probable cause to believe that the law has been violated," *id.* (citations omitted), only some reasonable basis for believing that the information will prove relevant. *Id.*

apparent reason for confining the inquiry to members of the bargaining unit, and the respondent offers none. Under these circumstances, it seems likely that a district court would have enforced the subpoena.

The respondent maintains, however, that 29 U.S.C. § 161(2) grants exclusive enforcement power to the district courts and that the agency lacks statutory or constitutional authority to impose sanctions for noncompliance.

Although the issue apparently has not arisen in this circuit, similar sanctions were imposed in *NLRB v. C. H. Sprague & Son Co.*, 428 F.2d 938 (1st Cir. 1970). The employer refused to comply with any part of a subpoena though it contended that only one part was irrelevant. *Id.* at 942.

The court held that the employer lost the right to rebut evidence on matters covered by the subpoena because it would be unfair to allow it to do so when it had documents that would be decisive (some were of undisputed relevance) but refused to produce them. *Id.* The *Sprague* court stated, however, that "if the company were taking the position that all the information sought by the subpoena was irrelevant, we might agree with its position." *Id.*[3]

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[3]*See also NLRB v. American Art Industries, Inc.*, 415 F.2d 1223, 1229-30 (5th Cir. 1969), *cert. denied*, 397 U.S. 990, 90 S.Ct. 1122, 25 L.Ed.2d 397 (1970); *Bannon Mills, Inc.*, 146 NLRB No. 81 (1964).

The instant case does not involve the "best evidence" rule. The precluded evidence would not merely prove the contents of documents but prove facts independent of the documents.

Cf. UAW v. NLRB, 459 F.2d 1329, 1346-47 (D.C.Cir. 1972) (Board erred in failing to draw adverse inference from party's failure to produce subpoenaed documents, even though enforcement had not been sought in district court).

The administrative law judge here indicated that he would draw adverse inferences from the respondent's failure to produce the personnel records, but concluded that "for the most part it was unnecessary" to do so.

We agree that "the adverse inference rule in no way depends on the existence of a subpoena," *UAW v. NLRB*, 459 F.2d at 1338, though we doubt, in view of our present holding that "the willingness of a party to defy" an NLRB subpoena, prior to any district court proceeding, "strengthens the force of the preexisting inference." *Id.*

The respondent takes the position that all information sought but not produced (or offered) is irrelevant. The Board replied that the respondent's assertion of irrelevance is frivolous. Were the issue to arise in a discovery proceeding, Rule of Civil Procedure 37(b)(2) would authorize the court to impose sanctions for bad faith refusal to comply with discovery orders. The sanctions could include dismissing a party's claim or precluding introduction of evidence on relevant issues as well as imposing penalties for contempt and awarding expenses to opposing parties. *Id.*

The Rules of Civil Procedure are applicable to NLRB proceedings "so far as practicable." 29 U.S.C. § 160(b).[4] But, as one commentator notes, "although courts can only impose rule 37(b)(2) sanctions after a ruling on all objections, and then only for disobedience of a judicial order compelling discovery," and agency imposing such sanctions "asserts that for disobedience of its order directing discovery, it can impose the sanctions first and let the judicial questions be asked later." Williams, *Authority of Federal Agencies to Impose Discovery Sanctions: The FTC—A Case in Point*, 65 Geo.L.J. 739, 756 (1977).[5]

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[4]This provision probably does not require the agency to follow district court discovery procedures, *see P. S. C. Resources, Inc. v. NLRB*, 576 F.2d 380, 386 (1st Cir. 1978), but once a subpoena is issued these discovery procedures may be generally analogous to the methods sought to be used here.

[5]Williams suggests that the power to impose discovery sanctions (and to determine the propriety of a subpoena) is inherently judicial and emerges from the contempt power. Williams, *Authority of Federal Agencies to Impose Discovery Sanctions: The FTC—A Case in Point*, 65 Geo.L.J. 739, 744 (1977). "Because the contempt power is not and cannot be vested in administrative agencies, those agencies lack the authority to impose discovery sanctions." *Id.*

He concludes that Congress has not vested agencies with this power and could not do so without violating due process by denying the party a fair opportunity to object to the discovery order. *Id.*

In *Interstate Commerce Commission v. Brimson*, 154 U.S. 447, 14 S.Ct. 1125, 38 L.Ed. 1047 (1894), the Supreme Court stated:

> The inquiry whether a witness before the [Interstate Commerce] Commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession and called for by that body, is one that cannot be committed to a subordinate administrative or executive tribunal for final determination.

Id. at 485, 14 S.Ct. at 1136.

This language makes clear that challenges to agency subpoenas must be resolved by the judiciary before compliance can be compelled. The agency "could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment." *Id.* Nor, we believe, may the agency impose discovery sanctions, which may have more serious consequences than a fine, before the judicial questions have been asked and answered.[6]

"Congress has made elaborate provisions for obtaining and enforcing [NLRB] subpoenas," and "[i]t was obviously its intention that this machinery be utilized." *NLRB v. C. H. Sprague & Son Co.*, 428 F.2d at 942. We may not infer that Congress intended to authorize agencies to bypass district court enforcement proceedings. An efficient and fair enforcement mechanism has been provided and was meant to be used. We therefore conclude that Congress granted

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[6]Although *Brimson* makes reference to "fine or imprisonment" to compel obedience, its essential import is that a federal agency lacks authority to make a "final determination" whether a witness is "bound" to produce subpoenaed documents. The use of different sanctions does not render the agency's assertion of authority to make such a determination any less a usurpation.

the district courts exclusive authority to compel compliance with NLRB subpoenas.

Because the secondary evidence is essential to the finding that Lavendera and Guzman were improperly discharged and the agency lacked authority to bar rebuttal of it, we remand this portion of the case for the taking of additional evidence and an opportunity to seek enforcement of the subpoenas in district court. *See* 29 U.S.C. § 160(e).

Application for enforcement GRANTED in part, REMANDED in part.

KENNEDY, Circuit Judge, concurring specially:

I concur in the result.

APPENDIX B.

Order.

In the United States Court of Appeals, for the Ninth Circuit.

National Labor Relations Board, Petitioner, vs. International Medication Systems, Ltd., Respondent. No. 79-7584.

Before: Wright, Kennedy and Alarcon, Circuit Judges.

Filed August 17, 1981.

Judges Wright and Alarcon have voted to deny the petition for rehearing.

The petition for rehearing is denied.

APPENDIX C.

Order.

In the United States Court of Appeals, for the Ninth Circuit.

National Labor Relations Board, Petitioner, vs. International Medication Systems, Ltd., Respondent. No. 79-7584.

Before: Wright, Kennedy and Alarcon, Circuit Judges.

Filed September 18, 1981.

The panel as constituted in the above case has voted to deny the petition by the Board for rehearing, and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX D.

Decision and Order.

International Medication Systems, Ltd. *and* California Teamsters Public Professional and Medical Employees, Local Union No. 911, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Cases 21-CA-16588, 21-CA-16678, and 21-CA-16925. September 5, 1979.

By Chairman Fanning and Members Jenkins and Murphy.

On April 5, 1979, Administrative Law Judge James M. Kennedy issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed limited cross-exceptions, which Respondent answered.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative

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[1]We find it unnecessary to pass upon the General Counsel's exceptions that statements by Supervisors Gonzales and Contreras, that Lavendera had been fired for supporting the Union, violated Sec. 8(a)(1) since the violation would be cumulative and would not affect the remedy or Order.

Law Judge and hereby orders that the Respondent, International Medication Systems, Ltd., South El Monte, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

Notice to Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all parties had the opportunity tc present evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and we have been ordered to post this notice.

The National Labor Relations Act, as amended, gives all employees the following rights:

To organize themselves

To form, join, or support unions

To bargain as a group through a representative they choose

To act together for collective bargaining or other mutual aid or protection

To refrain from any or all such activity except to the extent that the employees' bargaining representative and employer have a collective-bargaining agreement which imposes a lawful requirement that employees become union members.

We will not create the impression that our employees' union activities are under surveillance.

We will not interrogate our employees about their union activities or whether they signed authorization cards on behalf of California Teamsters Public, Professional and Med-

ical Employees, Local Union No. 911, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other union.

We will not recruit employees to report on the union activities of other employees.

We will not threaten employees with loss of their jobs (whether by discharge, forced quits, or plant closure) to discourage them from seeking union representation.

We will not tell employees that union representation is futile.

We will not discharge or otherwise discriminate against employees because they engage in union activity.

We will not in any other manner interfere with, restrain, or coerce employees in the exercise of the rights set forth above which are guaranteed by the National Labor Relations Act.

We will immediately offer Frances Lavendera and Lucila Guzman full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or any other rights or privileges previously enjoyed, and we will make them whole for any loss of earnings they may have suffered as a result of our discrimination against them, including interest thereon.

International Medication Systems, Ltd.

APPENDIX E.

Decision.

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge: This case was heard before me on December 11-13, 1978,[1] in Los Angeles, California, pursuant to a second consolidated amended complaint issued on September 15 by the Regional Director for Region 21, and which was further amended at the hearing. The complaint is based on charges filed by California Teamsters Public, Professional and Medical Employees, Local Union No. 911, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein called the Union). The complaint alleges that International Medication Systems, Ltd. (herein called Respondent) has engaged in and is engaging in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended.

Issues

The complaint alleges that Respondent violated Section 8(a)(3) and (1) of the Act when it discharged two of its employees, Frances Lavendera and Lucila Guzman. These two employees appear to have been the most visible union adherents during the Union's organizational campaign which began in late March 1978. Respondent defends, arguing Lavendera was laid off because her job was no longer needed and averring Guzman was discharged because she improperly overstayed a leave of absence. The complaint further alleges that Respondent violated Section 8(a)(1) of the Act in several ways by threatening, restraining, and coercing employees from engaging in union activities by:

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[1]Hereinafter all dates are 1978, unless otherwise noted.

creating the impression of surveillance of those activities, threatening employees with discharge or other reprisals, threatening them with more onerous working conditions, interrogating employees regarding their union activities, sympathies, and desires, and threatening to close the plant. Further, evidence was adduced at the hearing tending to show that Respondent attempted to recruit employees to report on the union activities of other employees and also made statements tending to demonstrate the futility of union representation. Respondent adduced evidence tending to deny some of these allegations, but not all.

In analyzing this dispute, I have made credibility determinations, including drawing adverse inferences where necessary due to Respondent's failure to comply with a subpena.[2] As will be seen, however, for the most part it was unnecessary to draw adverse inferences as the evidence was generally sufficient to prove the allegations without drawing them.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally. Both the General Counsel

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[2]At the outset of the proceeding the General Counsel demanded production of various documents pursuant to a previously issued subpena. While Respondent complained in many respects, it refused to release evidence relating to a defense accurately anticipated by the General Counsel. In that circumstance I permitted the General Counsel to adduce evidence on those topics by secondary methods and barred Respondent from rebutting it. In this connection see *Bannon Mill, Inc.*, 146 NLRB 611, fn. 4, 633-34 (1964); *American Art Industries, Inc.*, 166 NLRB 943 (1967), enfd. in pertinent part, 415 F.2d 1223 (5th Cir. 1969); and *N.L.R.B. v. C. H. Sprague & Son Co.*, 428 F.2d 938 (1st Cir. 1970). With regard to the permissibility of drawing adverse inferences against Respondent in this situation, see *Interstate Circuit Inc., et al. v. United States*, 306 U.S. 208 (1939); *Paudler v. Paudler*, 185 F.2d 901 at 903 (5th Cir. 1950), cert. denied 341 U.S. 920 (1951); *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) v. N.L.R.B.*, 459 F.2d 1329 at 1335 (D.C. Cir. 1972); and *Monahan Ford Corporation of Flushing*, 173 NLRB 204 (1969).

and Respondent filed post-hearing briefs which have been carefully considered.

Upon the entire record of the case.[3] I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent admits it is a Delaware corporation engaged in the manufacture of pharmaceuticals at a plant in South El Monte, California. It admits that in the normal course and conduct of its business it annually purchases and receives goods and products valued in excess of $50,000 directly from suppliers located outside California. Accordingly, Respondent admits, and I find, that it is engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

At material times Respondent's South El Monte facility consisted of 12 buildings and it employed between 200 and 250 individuals. Its chief executive officer is Robert Ogle, who is both chairman of its board of directors and corporate president. The vice president of operations is William Hin-

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[3]The General Counsel filed a motion to correct the transcript. Respondent filed a partial opposition thereto. Having considered the matter, it is apparent the alleged errors in the transcript do not significantly change the meaning of the testimony. They are obvious typographical or grammatical errors which are readily apparent. I deem it unnecessary to make those corrections and hereby deny the motion, including those matters which Respondent does not oppose.

derer. Each of the various buildings houses one or more departments. In general, each department head (who usually is also in charge of the entire building) wore a gold coat. The department head was assisted by employees who wore blue coats whose duties, with possibly one exception, are those of lead persons. The lead persons directed production personnel who wore either white or green coats.

1. Francis Lavendera

Frances Lavendera, at the time of her layoff on April 7, was employed in building 4. She was originally hired in 1976 to work as a packager in building 6. Shortly thereafter she was transferred to building 4 where she worked in the chemistry laboratory with some of the glassware and also helped make some medias for the microbiology department. After a short time she was returned to building 6 as a packager. Later, she was again transferred to the chemistry laboratory. Ultimately she became a quality assurance (QA) inspector. She completed a QA on-the-job training program in mid-1977. As a QA inspector she was under the direct supervision of Dr. David Chai,[4] the QA director, who assigned her to inspect various production areas. She performed these duties for several months. According to Lavendera, sometime in mid- to late 1977, Chai advised her a layoff was upcoming and, because he wanted her to be available as a QA inspector, he was going to temporarily again assign her to the chemistry laboratory. She recalled him saying that as soon as business volume resumed she would be returned to her QA inspector duties. Only once, during an FDA inspection in September 1977, while she was assigned to that lab was she asked to momentarily resume QA duties.

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[4]Chai holds a Ph.D. in chemistry.

Her tasks in the chemistry laboratory principally consisted of menial labor, including cutting paper, mailing, washing glassware, and cleaning the animal cages. In early 1978 the then chief of the microbiology department, Sue Gaynor, left Respondent's employment. At that point Chai told Lavendera she was to be transferred to the microbiology laboratory located in building 2 to fill a vacancy caused by a promotion in replacing Gaynor. Chai explained to her that if this transfer did not work out, he would see that she was transferred to another department, as Respondent did not wish to let her go. She was not sent to the microbiology department but remained in building 4 where she was assigned to make medias to be utilized by the microbiology department for its testing of product sterility. She was occasionally called upon to wash glassware and to assist in preparing animals for tests.

During the second week in March 1978 she decided to seek union representation and telephoned the Union. Shortly thereafter she met with Union Organizer Dick Sierra. Sierra gave her approximately 200 authorization cards to be distributed among Respondent's employees. She signed a card and immediately began soliciting employees' signatures on Respondent's premises. She was quite visible during this process as she handed out cards in company driveways and lunchrooms as well as the adjacent street. In addition she took cards to employees' homes. She also solicited the assistance of another employee, Lucila Guzman, who worked in building 6. One day while the two were having lunch in the lunchroom at Building 5, Lavendera gave Guzman approximately 20 cards. Guzman obtained signatures on all of them and returned them to Lavendera, asking for additional cards which Lavendera gave her. Guzman then solicited an additional 10 to 15 signatures.[5]

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[5]Lavendera also gave Maria Garcia, a "white room" employee from building 7 approximately 20 cards for employee signature solicitation.

Shortly before giving Guzman her first packet of cards, Lavendera had had a conversation with Yvonne Ruiz, a gold coat who supervised building 6, the packaging department. Ruiz was Guzman's immediate supervisor. Lavendera had gone to building 6 and saw Ruiz in the hallway. She asked Ruiz to speak to her in a restroom. Ruiz asked her what she was doing in building 6 and if Lavendera was on her break. Lavendera replied that she was, did not have much time, and was going to be passing around some union cards. Ruiz asked Lavendera if she was not afraid and Lavendera replied she was not. Ruiz then shrugged her shoulders and said, "Well, just don't get me involved." That day Lavendera gave the cards to Guzman. The card solicitation period lasted for approximately 2 weeks.

Lavendera's vacation was scheduled to begin on Monday, April 10. However, on Thursday, April 6, two pertinent incidents occurred. The first involved two conversations with Chai. At one point during the day she was passing Chai's office and he asked her if she was leaving on her vacation "tomorrow" (which I presume to mean after work on Friday, April 7). She replied she was; he then asked her if she was certain she wished to go on vacation for as long as 2 weeks. When she replied she did, he asked if she would not rather take money instead of taking time. She recalls him asking, "Are you sure? Because we need you." She replied, "No, I need the time off."

Before the conversation ended she asked him if he was going to give her an anniversary raise, as her employment anniversary had occurred the day before, April 5. Because other people were present, he asked her to refrain from speaking about it until later. Shortly thereafter he called Lavendera to his office and told her that she would get her anniversary raise when she returned from her vacation.

The second incident occurred that evening when the first union meeting was held at her home. It was attended by approximately 20 employees as well as Union Organizer Dick Sierra.

On the following day, Friday, April 7, janitor Jose Campero was working in building 4 near Chai's office. Chai saw him and asked him into the office where they had a conversation. Campero says that after they exchanged pleasantries Chai asked him if he knew anything about a union. Campero replied he did not. Then, according to Campero, Chai asked him if he knew anybody as a leader of a union. Again Campero replied he did not.[6] Campero recalled Chai stated there had been previous times when a union had attempted to come into the Company but that it was kind of silly to do so, "because this isn't the sort of company that a union can come into. It is strictly with the government." Then Chai specifically asked Campero if Lavendera was a union leader. Campero denied she was, saying he didn't know who the leader was.

Campero then left Chai's office and a few minutes later saw Lavendera. He had concluded from Chai's inquiry that Lavendera's job was in jeopardy. He told her that Chai knew everything about the meeting at Lavendera's house the night before and had been questioning him about it. He told her he thought she was going to get fired. Lavendera asked Campero how Chai knew, but Campero did not know. He could only tell her that Chai had questioned him about her saying that Chai knew she was the captain and Campero thought she was going to get fired.

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[6]Campero had previously signed a card at Lavendera's solicitation.

As a result, Lavendera decided to speak to Chai but had to wait until later in the morning. She found him upstairs in the microbiology department and asked if she could speak to him. He invited here to his office on the floor below. Upon arriving at his office, she opened the conversation saying she knew he had been asking questions about her having a meeting at her house the night before and said she wanted to tell him that she was not involved in those activities. He replied that he was not asking questions but had found out that morning she had signed a union card. She replied that if she signed a card or if she threw it away or whatever, she was not going to tell him, she had just come to clear her name. He said, "Frances, I don't care if you are a union member or not. You can be a Republican or Methodist or a Catholic, whatever. I don't care what you are, but I found out this morning that you signed a card, a union card." She told him that he could not fire her for that and he replied, "I know I can't fire you for this, but after lunch I can find any excuse to let you go." Then, according to Lavendera, he opened the door and called in one of the secretaries, Edith, and again repeated his statement that he did not care if she was a union member, a Republican, or a Catholic or whatever, and that she could go back to her job.

Later, about 3 p.m. he called her to his office again. He attempted to also call the chief microbiologist, Andy Movius, but could not reach him. Lavendera testified Chai began the conversation with her by asking if she knew Respondent was making lidocaine jelly.[7] Lavendera replied

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[7]"The Physicians Desk Reference," (32d ed., 1978) at 589, states that lidocaine jelly is a topical anesthetic commonly used in catheterization procedures. Lidocaine, in jelly and other forms, is more commonly known under its copyright name, Xylocaine. It is also manufactured as an injectible, but that use is not pertinent here.

that she was aware of that fact. He then asked her if she knew lidocaine jelly did not have to be sterilized; she replied she did.[8] He then asked her if she knew "we" were moving to building 2;[9] she replied she was aware of that as well. Then he told her they would not be moving to building 2 and because lidocaine jelly did not have to be sterilized he was letting her go. She asked, "Go where?" He did not respond verbally but opened his drawer and handed her an envelope. At that moment she understood it was her paycheck. She asked him whether she was being fired because of their conversation that morning about the Union, but he replied he was not firing her, "I am just laying you off." He remarked that he hoped the Union did something good for her, because it had not done anything good for him. He also asked here why no one had given him a union card and why no one had asked him anything. She replied she did not know and he said, "Well, like I told you before, I don't care if you are a Republican, Protestant or whatever." Then he told her she was paid until 4:30 p.m. but she could leave now.

Isabel Lucero was a glassware washer in the building 4 laboratory. On April 10, pursuant to Chai's instructions, she began making the microbiology media previously made by Lavendera. She testified that that morning Chai called her into his office and told her she was now to make media and do her own job as well. He told her he had laid off Lavendera because there was not enough work, "Not be-

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[8]Lavendera had never worked with lidocaine jelly and did not really know whether it required sterilization. In view of its use in catheterization procedures, I doubt that a nonsterile product would be acceptable.

[9]The record is not clear whether Chai was referring to the QA department or the microbiology section of the chemistry lab. Building 2 was a microbiology lab utilized by the QA department, but QA headquarters were in building 4.

cause of any union activities or any meetings or anything like that, that he didn't care about that." He asked if she had any questions and she asked him why he had laid off Lavendera instead of her since she had been ill and had had to cut back her working hours. He replied there was "very little he could tell Frances to do." Lucero asked if she would be getting paid more for doing both jobs but he said he would have to see how she was doing first.

Lucero worked for several days doing both jobs, but then quit because of the illness (a foot problem) mentioned above. Before leaving, Lucero trained another individual to make the media.

Manuela Espinoza is a janitor who cleaned several buildings, including No. 3, the vial injector assembly area. In April the "gold coat" in that area was Annie Gonzalez. Espinoza testified she signed a card solicited by Lavendera one day at the bus stop. She was also solicited by Guzman. She remembers one day in early April she was cleaning the office next to Gonzalez' when Gonzalez came in and asked her if she knew Lavendera had been dismissed. Espinoza replied that she did not; Lavendera had said she was going on vacation. Gonzalez told her Lavendera had been dismissed because of the Union and that Chai had dismissed her.

Esperanza Robles worked building 7, the pharmaceutical production department. She worked in the sterile filling room, known as the "white room." The gold coat for that department was Joyce Staggs. However, the senior white room supervisor was a blue coat named Connie Contreras.[10] Robles recalls that sometime in March (probably April because Lavendera's departure did not occur until April) that

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[10]Contreras' supervisory status is in issue and is discussed *infra*.

Contreras had told her that Lavendera had been dismissed because she was supporting the Union.

Maria Garcia testified that in April, in Robles' presence, Contreras asked her whether Garcia knew if Lavendera had come in that morning. Garcia replied she did not know as she had come in early. Then Contreras asked her if she knew that a lot of girls from building 7 had signed union authorization cards. Garcia professed not to know and asked Contreras if she had signed. Contreras replied she had not and Garcia asked why not, was Contreras afraid to get fired? Contreras answered "Well, Bill Hinderer (Respondent's vice president in charge of operations) had said that those who signed cards would be fired." Robles corroborated Garcia, including Contreras' remark about Lavendera's absence.

Chai denied that he discharged Lavendera because he had learned of her union activities. He asserts that he discharged her because he had learned in late March, approximately 10 days before her layoff, that one of Respondent's products, inhalation medication, did not require sterility tests. He had reviewed certain Food and Drug Administration regulations and had concluded that sterility testing on that particular product line was no longer necessary. Accordingly, on March 31, he so told Respondent's president, Robert W. Ogle. Chai also wrote a memo to that effect on that date. He testified that as the inhalation medication no longer required sterility testing. Lavendera's job was eliminated in order to reduce the number of employees in the microbiology control laboratory where Lavendera worked as a QA inspector. He said that, although the decision to eliminate the job was made on March 31, it was not carried out until April 7 because of the existing tests that were then underway.

He did not deny Lavendera's testimony regarding their April 6 conversations and, although he admits having had a conversation with her on April 7 regarding her discharge, he denies asking her if she had been involved with the Union and denies telling her he had found out she had signed a union authorization card. He also denied saying he would find an excuse to fire her. With respect to Campero's testimony, Chai said Campero had once asked him what he thought of the Union, and he had told Campero that he did not feel one way or the other about it and that Campero was free to vote however he chose. With regard to Lavendera's testimony that the two had discussed lidocaine jelly and the cancellation of moving the microbiology laboratory to Building 2, he testified that he "didn't know" if either subject was discussed.

He was asked by the General Counsel if he had brought to the hearing the FDA regulations upon which he had allegedly relied in concluding the inhalation medication no longer needed sterility testing. He answered that he had not brought them with him.

2. Lucila Guzman

As noted, *supra*, Lucila Guzman solicited and obtained approximately 25 signatures of rank-and-file employees on union authorization cards. This had been done at the behest of Frances Lavendera. They had principally been solicited in the lunchroom of building 5, and in the parking lot between buildings 5 and 6. She was employed in building 6 as a blue coat, a table supervisor in the packaging department. Her immediate superior was gold coat Yvonne Ruiz, the department head.

In April or May, Guzman had asked the personnel department for permission to take the first 2 weeks of July as her vacation period together with an extra week on leave

of absence. Permission had been granted and had been approved by Ruiz as well. Her last day of work was Friday, June 30, as she began her vacation on Monday, July 3. She was aware of a company policy that vacation periods were to be extended by 1 day if a paid holiday fell during the vacation period. In this case, Independence Day fell within her vacation period and was a paid holiday. Thus, she testified she believed her vacation and leave of absence extended through Monday, July 24, with a reporting date of Tuesday, July 25.

On July 6 the NLRB election was conducted at Respondent's premises. Guzman was the Union's observer. She attended the preelection conference conducted in President Ogle's office and, as it was breaking up, Vice President Hinderer asked her, "Is this a fine way to have a vacation?" She replied, "Oh, yes." This testimony is undenied and it is clear that Respondent was aware she had returned from her vacation to serve as the Union's observer during the election.

Believing her reporting date to be Tuesday, July 25, Guzman did not report on Monday, July 24. Ruiz testified that when Guzman did not appear for work on July 24, she decided to discharge her. Accordingly, she sent Guzman a telegram saying she was terminated on that date and her check would be mailed. Ruiz testified Guzman's extra day of vacation, for the July 4th holiday, had been Monday, July 17. Accepting that logic, Guzman's leave of absence turned out to be only for 4 days.

Guzman testified without contradiction that she had asked for a full week's leave of absence and no one had ever told her she had only been granted 4 days. She also said she does not recall ever being told she had to return to work on July 24. Both she and Ruiz agree she had been told she ran

the risk of being replaced during her leave of absence, but that was a risk she was apparently willing to run.

Ruiz testified she determined to discharge Guzman on July 24 because she had a poor attendance record. She said she waited until 3 o'clock that day, but Guzman never appeared, so she sent the telegram. With regard to Guzman's alleged poor attendance record, it appears that in May 1977 Ruiz' predecessor had spoken to Guzman about being late and, at one point, though the date is not clear, she had received a written warning regarding tardiness.

It is clear from the testimony of a number of witnesses that Respondent's policy regarding unexcused absences was to permit an employee two unexcused absences, but that the third was a ground for discharge. There is no evidence that Ruiz afforded Guzman the benefit of the policy. In addition, Ruiz acted quickly and peremptorily by sending a wire rather than awaiting Guzman's appearance. Moreover, Guzman appears to have been home on Monday, July 24, and Ruiz could easily have telephoned her before taking such a drastic step as severance.[11]

B. *Facts Relating to Alleged Interference, Restraint, and Coercion*

The complaint alleges that Respondent engaged in certain additional conduct which unlawfully deprived employees from freely exercising their Section 7 rights by accusing it of unlawfully creating the impression of surveillance of employees' union activities, threatening employees with discharge or other reprisals, threatening employees with more onerous working conditions if they chose the Union to represent them, interrogating employees regarding their union activities, sympathies, and desires, and threatening

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[11]Guzman testified that she has a telephone in her house.

employees with loss of their jobs by threatening to close the plant. Much of the evidence adduced by the General Counsel is unrebutted.

1. Gloria Aparicio

The General Counsel has accused building 5 gold coat Gloria Aparicio, the shipping department supervisor, of violating Section 8(a)(1) of the Act in various ways. In this regard, the General Counsel relies on the testimony of employees Elvira Castro, Maria Lopez, Manuela Espinoza, and Josie Saavedra. Castro and Lopez worked as packagers, Espinoza is a janitor, and Saavedra was a laundry department employee.

Castro testified that shortly before a layoff, which occurred on April 28, she was speaking to Aparicio at her work table. Lopez arrived during the conversation. They testified Aparicio asked whether Castro had taken some union cards and told Castro to tell her the truth, as she did not want Castro to lie, because that evening she was going to have a meeting with President Ogle to discuss the Union. She said she did not want Castro or Lopez to lie to her because if the man (Ogle) found out she had given him misinformation, she would be reprimanded. Lopez adds Aparicio said Ogle was going to ask her if "her girls" had signed union authorization cards and if she said they had not, he would accuse her of lying and show her the cards. Aparicio then asked them both if they had signed union cards. Castro said she had only learned about the drive that morning; Lopez replied she hadn't yet had a chance to get one from the union organizer.

In addition, Josie Saavedra testified that on one occasion in early April she and five or six other people were having lunch in the building 5 lunchroom. Present were Aparicio, senior white room supervisor Connie Contreras, and several

employees, including a Beckie and a Queenie, as well as Saavedra's husband, Armando, who worked in building 6. Beckie said she had nearly run over a union organizer that morning and Aparicio, in an apparent joke, said she should have. Then Aparicio asked what the organizer had been handing out. Two of the employees offered that they thought the Union was a good idea. Aparicio said she wanted to know if the employees present knew who had signed the union cards and if anyone in building 7 had signed. Saavedra remembers Aparicio asking the employee named Queenie, who worked in building 10, to find out who had signed cards in that department. She says Aparicio also asked her husband, Armando Saavedra, to find out who had signed in building 6.

Saavedra also testified that later, during another lunch, Aparicio came in saying she was "sick to her stomach" because President Ogle had told her Respondent's attorney had said at least 42 employees had signed union authorization cards. Saavedra reports Aparicio as saying Ogle had "good lawyers and that they are willing to fight and that if we knew of anybody that had signed with the Union or anything, that they would be terminated because Mr. Ogle was going to find out who had signed because if he would have to go to court, he would have to see a list of names before he would appear or do anything." Saavedra also recalls Aparicio as saying Ogle loved to fight and that the Union had tried to get in before, but had failed and Ogle either had had or would have the Union for breakfast.

Espinoza testified that shortly before the election Aparicio called her to the packaging room office. A clerical named Lettie was present. Espinoza says Aparicio asked her if she was ready to vote. When Espinoza told her she did not know, Aparicio said that it would be better if Espinoza voted no, otherwise the owner would close the Company. Espi-

noza says Aparicio also told her she could lose her job if she voted yes. Espinoza replied that she did not care if she lost her job, that God had given it to her and could also open the way for another job.

Respondent adduced no evidence to counter any of the foregoing, except to observe that Saavedra may have had a bias against the Company for being discharged unfairly. I have carefully examined her testimony nd can find no evidence that it was colored by bias.[12]

2. William Hinderer

William Hinderer, as previously observed, is Respondent's vice president in charge of operations. One of his duties is to oversee production. In the course of that duty he often dressed in sterile clothing so he could be present during medication fills in the white room. Anna Perez, a white room blue coat, testified that on June 26 she and Hinderer, together with employee Charlotte Witt, were in the second dressing room putting on their "bunny suits," sterile uniforms. She remembers Hinderer saying to Witt that if the girl's did not like it here, why did they stay? If they thought the Union was going to get them more money, they were wrong. He said he felt sorry for the girls because the Union had promised them a lot of things he did not think they were going to get. Witt asked Hinderer if he still was going to do what he had said he was going to do. Hinderer asked her what she meant and Witt said, "You

[12]She was fired when she became angry at Respondent for requiring her to use her personal car to take an employee to the hospital. She thought Respondent should have used one of its own vehicles. She says another reason given her for the discharge was that Respondent would no longer permit two members of the same family to be employed by it. If the bias which she may have over her discharge affected her testimony, I could not detect it. Certainly in light of evidence elsewhere her testimony appears entirely probable.

said you were going to fire all the girls, if the Union came in and hire new ones." Perez testified Hinderer responded: "I didn't say that. Ogle said he would." Witt replied, "Well, I feel sorry for him if he does that." Hinderer continued, saying he "didn't put it past him (Ogle) because he was that kind of a man."

3. Connie Contreras

The complaint alleges that Connie Contreras is a statutory supervisor and that she threatened employees with discharge and onerous working conditions if they selected the Union to represent them. Respondent denied her supervisory status, and I shall deal with that issue first. Although Contreras did not testify, it appears that she had worked for Respondent as a lead girl in the white room for several years. In fact, personnel documents show she was promoted to "capping supervisor" in January 1976. In October 1976, according to an employee change request, she was given a 35-cent increase for her 5 years' service; that, too, refers to her status as a supervisor. Again, in February 1978, a rate card shows she received a 10-cent increase and was classified as a white room supervisor. However, Contreras was a blue coat, and it was common practice within Respondent's personnel system to refer to all blue coats as "supervisor." Indeed, I am satisfied that with the possible exception of Contreras, the blue coats are not statutory supervisors.

Contreras' situation, however, appears to be different, at least for several months' beginning in February 1978. During that month Joyce Staggs was appointed to be the building 7 department head, replacing an individual who had left. Operations Vice President Hinderer announced Staggs' appointment as a gold coat at a meeting of all building 7 employees. He testified the purpose of the meeting

was to introduce Staggs as the new production manager. He said he told the employees that remaining "supervision" would remain the same and he named all the blue coats. He told the employees they would get an across-the-board raise[13] and he would wipe clean all the attendance records. He testified that at that time Contreras was the "senior white room supervisor." Staggs, who became Contreras' immediate superior, testified she had never heard that term before the instant hearing. However, white room, blue coat Perez remembers Hinderer referring to Contreras as the "senior supervisor of the white room" during the February meeting, and also heard him repeat it later in March when Charlotte Witt was rehired. Esperanza Robles remembers Hinderer saying during the Staggs' introduction that Contreras was "in charge of the white room." Likewise, Josie Saavedra testified Hinderer said during the meeting that if building 7 employees could not locate Staggs in the event problems arose, they were to go to Contreras.

It is clear that the supervisor/employee status of an individual depends not on his or her title, but on the duties performed. There is a great deal of testimony in the record that Contreras assigned employees their daily tasks. Indeed, it appears that, at least until the authority was taken from her in the late summer, she scheduled white room employees independently of Staggs. On occasion she was seen to overrule changes Staggs made. Moreover, there is her discipline of employee Carmen Mendez. Contreras and Mendez had gotten into a dispute regarding proper work procedures. Garcia heard Contreras tell Mendez that she would "get it." Immediately thereafter, Contreras assigned Mendez to white room cleaning, an undesirable job. According

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[13]Contreras' 10-cent wage increase in February was a result of Hinderer's action here.

to Garcia, corroborated by other employees, Contreras continued to assign Mendez the cleaning job for over a month as punishment for engaging in the dispute.

In addition, according to Perez, Contreras once threatened to send a white coat, one Olivia, back to the training room if she failed to correct her habit of making sloppy errors during fills in the white room. Perez also observed that Vice President Hinderer usually bypassed Staggs in order to confer with Contreras about white room matters. Furthermore, Contreras once told Perez that she had interviewed people to be employed in the white room and had recommended against their hire, and Respondent had not hired them. Moreover, it is clear that Contreras commonly reassigned employees whose white room work had ended for the day, but who still had not completed their workday, to buildings 3 and 6 to help out with vial injector assembly or packaging.

Contrary to this evidence is Staggs' testimony that the tasks performed by Contreras, such as scheduling and reassigning people, had simply been delegated to Contreras by her and that Contreras was merely following her directions. I was not impressed with Staggs as a witness. As noted above, she claimed she had never heard the term "senior white room supervisor," though it was utilized by Hinderer to describe Contreras, and others report Hinderer as having used the term in February. Staggs was defensive in attitude and appeared reluctant to speak. She lacked candor. It does appear, however, that Contreras' authority with regard to schedules and work assignments became limited during a layoff later in 1978. Perez describes that in some detail. After that layoff, Contreras' relative independence was lost. Nonetheless, her loss does not detract from my conclusion that during the preelection period beginning in March 1978 Contreras was a statutory supervisor. I reach this conclusion based on her ability to independently schedule employees

and reassign them, her apparent ability to effectively recommend that employees not be hired, her discipline of employees, and the fact that Hinderer apparently considered her to have special authority over and above that normally granted blue coats.

Having concluded that Contreras is a supervisor, I now proceed to the allegations in the complaint involving her. The evidence with regard to these matters is uncontradicted and is detailed by white room employee Maria Garcia. As noted above in the section dealing with Lavendera's discharge, in April, Contreras told Garcia she knew a lot of the girls in building 7 had signed union cards and after a discussion told Garcia that Hinderer had said those who signed would be fired. Later, in August, Contreras asked Garcia if she knew something about the Union. Garcia replied she did not, and Contreras told her the people who had signed the cards were stupid because the Union promised lots of things, but could not deliver them. She went on to say Ogle had told her he would never sign a collective-bargaining contract and no one could do anything about that. In addition, she told Garcia that Ogle was making the employees work very hard in order to force everybody to quit. Garcia recalls it was true that employees were being asked to do more because Respondent had reduced the number of employees to do the work.

Although Respondent did not call Contreras to rebut Garcia's testimony in this regard, it did note that in her pretrial affidavit she failed to include the August conversation. While in some circumstances this might be sufficient ground to discredit her, I do not believe it to be so here, particularly where Contreras could have been called to testify but was not. Accordingly, I conclude Garcia's testimony should be credited.

IV. ANALYSIS AND CONCLUSIONS

A. *The Discharge of Frances Lavendera*

Analysis of the evidence regarding the discharge or, euphemistically, the layoff of Frances Lavendera leads me to conclude that it was discriminatorily motivated.

It is clear that Lavendera was the leading employee organizer for the Union and Respondent knew it. She was visible in employee parking lots and lunchrooms soliciting signatures, and she solicited at least two other employees to assist her in that endeavor. It is undenied that the day before her discharge her immediate supervisor, Chai, asked her to forego her vacation because she was needed. He also advised her that she would get an anniversary raise after she returned from her vacation. That evening the first union meeting took place at her home, and on the following day she was discharged. Chai explains her discharge in extremely hollow terms, saying he had decided her job was no longer needed a week previously because certain inhalation medication no longer needed sterility testing.[14]

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[14]I tend to doubt Chai's testimony regarding the lack of need for sterility testing on the medications in question. It is true that Lavendera testified that in her exit interview Chai referred to lidocaine jelly. He says he cannot recall any reference to that product, referring instead to inhalation medication. It appears that in either case sterility testing would be likely. Moreover, there is credible evidence from Lavendera and Lucero to the effect that Respondent continued to need the same amount of media for such testing after Lavendera's departure as it did before. Lavendera testified that on her last day she was directed to make twice the amount of media (preparatory to her vacation). Lucero made notes of the amounts she was told to make and testified that she continued to make as much or more media as that made previously by Lavendera. She also says she trained a replacement. Chai, however, denies Lavendera was replaced by Lucero or anyone else. I find it is unnecessary to resolve the question of whether Chai spoke of lidocaine jelly or inhalation medication. Even if Lavendera is mistaken on the point, it would not affect my conclusions on other credibility matters between the two.

Lavendera had been specially trained as a QA inspector and had been repeatedly assured that her job was secure. In fact, during an earlier layoff, she was retained in a slightly different capacity in the production laboratory to insure that she would remain. Respondent had invested a certain amount of time and money in training her and did not wish to lose her. She was a versatile employee and, until she permitted a union meeting to be conducted at her home, Respondent had gone out of its way to keep her.

In addition, there is the admission made by Gonzalez to Espinoza that Lavendera had been dismissed because of the Union. It is true that Gonzalez was not Lavendera's immediate supervisor, but it is probable that she had knowledge of the decision-making process. Robles testified that Contreras made a similar admission to her, although I place less weight on that as Contreras was not as likely to be privy to the process as Gonzalez. Nonetheless, in view of other evidence, both admissions appear to be accurate reflections of Respondent's policy and are not simply the opinions of supervisors not privy to the actual decision. In any event, even Vice President Hinderer made a statement to the white room employees that employees who did support the Union would be discharged, though he denied it. It is true that he is said to have attributed the threat to Ogle, not himself. Assuming that the attribution to Ogle is accurate, it is extremely likely that supervisors such as Gonzalez, or even Contreras, might well be aware of the actual grounds for Lavendera's dismissal. Even if Hinderer was simply masking his own threat, as vice president of operations he was certainly echoing company policy. In any event, Chai did not deny that on April 6 he asked Lavendera to forego her vacation for cash or that he told her she would get her anniversary increase upon her return from vacation. I accept her testimony as true. It follows that Chai's testimony that

he made the decision to lay off Lavendera on March 31 is not worthy of credit. Certainly his memo on that date does not lend support to his testimony. It does not mention the need to reduce the employee complement in any fashion. Moreover, his self-effacing denial of unlawful motivation to Lavendera and Lucero only tends to suggest that the opposite of his denial is the truth. In this regard I note that he admits saying he did not care what Lavendera's religious or political preferences were and thereby partially corroborates her. He never denied Lucero's testimony that he volunteered to her that he hadn't fired Lavendera because of her involvement with the Union. His statement in that circumstance may reasonably be taken as protesting too much, for it was unnecessary and appears to have been triggered by guilt. I find, therefore, that Chai's reliance on the elimination of sterility testing as mandating Lavendera's layoff, if he did so at all, was simply a convenient excuse to discharge her, but was not the real reason for it.

Accordingly, I conclude that Respondent discharged Lavendera because of her union activities.

B. *The Discharge of Lucila Guzman*

Lucila Guzman was one of Lavendera's card solicitor assistants. In addition, however, she was the Union's observer at the July 6 election, having returned from her vacation to serve in that capacity. It is clear that Respondent was aware of her union activity. As observed elsewhere in this Decision, Respondent clearly had sufficient antiunion animus to be motivated to engage in a discriminatory discharge. Moreover, the reason given for her discharge is, as in Lavendera's case, specious. Guzman's supervisor, Yvonne Ruiz, testified she decided to discharge Guzman upon her failure to report for work on the Monday following the expiration of her leave of absence. Ruiz said she did this

because she was well aware of Guzman's spotty attendance record. She also relied on the fact that Guzman's permission to take the leave of absence was at her own peril as Guzman had been told that Respondent might, if it needed to do so, replace her. In Ruiz' mind that factor weakened Guzman's employment tenure. Frankly, I am puzzled why that condition was placed on her leave of absence in the first place. It seems a totally unnecessary condition to have imposed. It may well have been imposed because Respondent was already aware of Guzman's union activities and was attempting to set her up for a fall.

In any event, Ruiz did not follow Respondent's policy of permitting three unexcused absences before discharging Guzman. At best, this was only her first, although she may have been tardy before. Furthermore, Ruiz did not counter Guzman's testimony that she had not been told the extra holiday would be subtracted from her leave of absence. Guzman did not know Respondent was treating her vacation as extended in this manner and not unreasonably believed it would be added to her leave of absence. Respondent's failure to explain that fact to Guzman at the same time it was carefully explaining the peril she was in if Respondent needed another employee seems strange to me. Finally, there is the haste in which Ruiz acted. She knew Guzman had a telephone but made no effort to reach her, waiting instead until the afternoon when she wired Guzman she had been discharged, giving Guzman no opportunity to explain her failure to appear for work. All this, it seems to me, leads to the conclusion that Respondent simply was awaiting an excuse to discharge Guzman. Indeed, it appears to have engineered Guzman's leave in such a way as to make it highly probable that a misunderstanding would occur. Ac-

cordingly, I reject Ruiz' explanation and conclude that Respondent utilized this incident as an excuse to discriminatorily rid itself of union-adherent Guzman.

C. *The Violations of Section 8(a)(1) of the Act*

It will be recalled that the allegations involving Supervisors Aparicio and Contreras are essentially undenied. Accordingly, I find that Aparicio, in April, unlawfully interrogated employees Castro and Lopez by asking them if they had signed union cards. In the same conversation she told them Ogle would show her their cards if they said untruthfully that they had not signed. The latter remark implies Ogle had access to the cards and clearly told those employees that Respondent was aware of their activity. That constitutes the unlawful creation of the impression of surveillance. Also in April, Aparicio unlawfully interrogated Josie Saavedra, as well as others, regarding the identity of card signers and attempted to recruit two employees to report on who else had signed cards. Later, when Aparicio said she was "sick to her stomach" because Ogle had told her 42 employees had signed cards, she again transmitted the expression that Respondent had the employees' union activities under surveillance. Simultaneously she said Ogle would fire card signers and that he would not deal with the Union until after a court fight. These statements are unlawful as well. The last announces the futility of union representation.

In July Aparicio continued to threaten employees unlawfully. On this occasion she told Espinoza she could lose her job if she did not vote against union representation.

I also find that Contreras violated the Act in April by telling Garcia she knew a lot of girls in building 7 had signed union cards and by telling her Hinderer had said card signers would be fired. Later, in August, Contreras contin-

ued to violate Section 8(a)(1) by saying card signers were stupid because the Union could not deliver on its promises because Ogle would never sign a collective-bargaining contract and no one could do anything about it. Finally, she violated the Act by saying people were being worked harder because they had voted for the Union with an object of forcing people to quit. The latter statement violates the Act in two ways. First, it amounts to a statement that the workload had been increased and made more onerous in reprisal for the employees' having selected union representation. Second, it is a thinly veiled threat of job loss for having selected the Union.

In addition, I find that Hinderer's statement to Witt, reported by Perez, to the effect that Ogle was the kind of man who would fire employees for engaging in union activities, was also an unlawful threat. It occurred on June 26, only 10 days before the election, and was designed to chill that activity. I recognize that Hinderer denied Perez' version, but I deem her version more probable in view of the fact that similar conduct was occurring elsewhere. Chai's interrogation of Campero regarding Lavendera was also unlawful.

Accordingly, I conclude that, for the most part,[15] the General Counsel has proven that Respondent violated Section 8(a)(1) by engaging in the above-cited conduct.

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[15]The General Counsel at the hearing amended the complaint to allege that Supervisor Annie Gonzalez on April 19 unlawfully threatened an employee with discharge. The only evidence supporting the allegation is her statement, considered as an admission, to Espinoza that Chai had fired Lavendera for supporting the Union. I cannot find a threat in this statement, except by excessive stretching. At best the threat is implied. In any event, the remedy would be the same as for more clear violations found elsewhere. This allegation should be dismissed.

V. THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act by threatening, restraining, and coercing employees in the exercise of their Section 7 rights and by discharging Frances Lavendera and Lucila Guzman because of their organizing activities on behalf of the Union, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. In addition, I shall recommend that Respondent be required to immediately offer Frances Lavendera and Lucila Guzman reinstatement to their former positions or, if they no longer exist, to substantially equivalent ones, without prejudice to their seniority or other rights and privileges and make them whole with interest for lost earnings in the manner prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[16] I have considered the General Counsel's supplemental brief requesting that the interest rate on backpay be increased to 9 percent. It appears to me that, while the General Counsel's motion is not without some merit, it is an argument which should be made directly to the Board because of its recent consideration of the matter in *Florida Steel*, *supra*.

Upon the foregoing findings of fact, and upon the entire record of this case, I make the following:

CONCLUSIONS OF LAW

1. The Respondent, International Medication Systems, Ltd., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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[16] *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

2. California Teamsters Public, Professional and Medical Employees, Local Union 911, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. On various dates in 1978, as shown in the body of this Decision, Respondent violated Section 8(a)(1) of the Act by: creating the impression that the employees' union activity was under surveillance, interrogating employees about their union activities and whether they had signed union authorization cards, recruiting employees to report on the union activities of other employees, threatening them with loss of their jobs (via discharge, forcing employees to quit, or closing the plant) and stating that union representation would be futile as no benefit could be obtained without a bitter fight, all with an object of coercing employees from selecting union representation.

4. On April 7 and July 24, respectively, Respondent violated Secion 8(a)(3) and (1) of the Act by discharging its employees, Frances Lavendera and Lucila Guzman, because they had engaged in organizing on behalf of the Union, holding union meetings, and serving as the Union's observer at an NLRB election.

5. Respondent did not engage in any other violations of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[17]

The Respondent, International Medication Systems, Ltd., South El Monte, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act by: creating the impression that employees' union activities are under surveillance, interrogating employees about their union activities and whether they had signed union authorization cards, recruiting employees to report on the union activities of other employees, threatening employees with loss of their jobs (whether via discharge, forced quits, or plant closure) and telling employees that union representation is futile.

(b) Discharging or otherwise discriminating in regard to the hire or tenure of employees because they engage in union activity.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Immediately offer Frances Lavendera and Lucila Guzman full reinstatement to their former jobs, together with backpay and interest thereon in the manner set forth in that portion of this Decision entitled "The Remedy."

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[17]In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its South El Monte, California, place of business copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms to be provided by the Regional Director for Region 21, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that any allegations remaining in the complaint not herein specifically dealt with be, and hereby, are, dismissed.

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[18]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Opposition

Office - Supreme Court, U.S.
FILED
FEB 18 1982
ALEXANDER L. STEVAS,

No. 81-1175

In the Supreme Court of the United States

OCTOBER TERM, 1981

INTERNATIONAL MEDICATION SYSTEMS, LTD., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that a procedural error that required it to remand those portions of the Board's order finding that petitioner had violated Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. 158(a)(3), did not affect the Board's finding that petitioner also had violated Section 8(a)(1) of the Act and therefore that portion of the order could be enforced.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 640 F. 2d 1110. The decision and order of the National Labor Relations Board (Pet. App. 14-47) are reported at 244 N.L.R.B. 861.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 1981. Thereafter, both the Board and petitioner filed timely petitions for rehearing, and the Board suggested rehearing en banc. On August 17, 1981, the court of appeals issued an order denying "the petition for rehearing" (Pet. App. 12). On September 18, 1981, the court of appeals issued a second order denying the Board's petition for rehearing and rejecting the suggestion for rehearing en banc (Pet. App. 13). The petition for a writ of certiorari was filed

on December 17, 1981. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).[1]

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. 2.

STATEMENT

1. Petitioner is a manufacturer of pharmaceuticals (Pet. App. 19). In 1978, the California Teamsters Public, Professional and Medical Employees, Local Union 911, attempted to organize petitioner's employees (*id.* at 17).

Two employees, Lavendera and Guzman, were conspicuous union activists during this campaign (*ibid.*). On April 6, 1978, Lavendera held a union meeting at her home and on April 7, after a discussion with one of petitioner's supervisors about her union activities, she was "laid off" (*id.* at 23, 25).

During the organizational campaign, Guzman obtained the signatures of numerous employees on authorization cards (*id.* at 28). Guzman took a company-approved vacation in July 1978, and based on her understanding of company leave policy she planned to return to work on July 25 (*id.* at 29). Petitioner calculated the leave time differently and concluded that Guzman was due to report on July 24. When Guzman failed to report on that day, a supervisor for petitioner sent her a telegram terminating her employment immediately (*ibid.*).

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[1] Petitioner assumes that the court of appeals denied its petition for rehearing on August 17, 1981. Judge Kennedy's dissent from that denial (App., *infra*, 2a), however, relates only to the issues raised in the Board's rehearing petition. Although we assume that the court of appeals intended one of its orders to be a denial of petitioner's petition for rehearing, it is not completely clear that the court of appeals has in fact acted upon that petition. If not, then the exercise of jurisdiction by this Court would be premature. See *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 177 (1944).

In addition to these two discharges, petitioner's supervisors were very active in attempting to "convince" the employees not to support the Union. One supervisor asked a number of employees to let her know who was signing authorization cards (*id.* at 32). The same supervisor also told employees that "anybody that had signed with the Union * * * would be terminated" (*ibid.*). Other supervisors also threatened employees with firing and claimed that petitioner's President would make the employees work so hard that they would quit (*id.* at 37).

2. The Regional Director's complaint alleged that Lavendera's layoff and Guzman's firing violated Section 8(a)(3) and (1) of the Act and that the actions of the supervisors in threatening, restraining, or coercing the employees constituted separate violations of Section 8(a)(1) of the Act (Pet. App. 17-18). Prior to the hearing before the Administrative Law Judge, the Board issued a subpoena *duces tecum* to petitioner calling for production of personnel records of employees to show the practice of the company with regard to layoffs and firings for absenteeism. Petitioner refused to comply fully with the subpoena, but the Board did not attempt to enforce it judicially.

At the hearing on the charged unfair labor practices, the ALJ imposed sanctions against petitioner for refusing to supply the records called for by the subpoena. The ALJ sanctioned petitioner by precluding it from putting in any evidence of its own or rebutting the general counsel's evidence as to the general practices relating to employee firings and layoffs (Pet. App. 1-2). The evidence thus overwhelmingly showed that the two discharges were discriminatory, suggesting strongly anti-union motivation.

The Board, adopting the findings of the ALJ, found that the layoff of Lavendera and the discharge of Guzman constituted violations of Section 8(a)(3) and (1) of the Act and

that the actions of the supervisors separately violated Section 8(a)(1) (Pet. App. 14-45). The Board ordered the employees reinstated with back pay and ordered petitioner to cease and desist from threatening and coercing its employees (*id.* at 14-16).

3. The court of appeals enforced the Board's order with respect to the violations of Section 8(a)(1), noting the presence in the record of "abundant evidence of interference, restraint, and coercion" (Pet. App. 3). The court, however, refused to enforce the Section 8(a)(3) portion of the Board's order on the ground that the ALJ had exceeded his authority by imposing "sanctions" for the petitioner's refusal to comply with the subpoena. The court held that Congress granted district courts exclusive authority to compel compliance with Board subpoenas (Pet. App. 7-11). Although it expressed substantial doubt about the effect of the preclusion order on the ultimate findings of the Board, the court nonetheless speculated that petitioner might have been able to present a defense to the Section 8(a)(3) claims on the basis that the discharges of the two employees were consistent with petitioner's general employment practices (Pet. App. 5, 7). The court, therefore, remanded the Section 8(a)(3) portion of the case "for the taking of additional evidence and an opportunity to seek enforcement of the subpoenas in district court" (Pet. App. 11).[2]

ARGUMENT

Petitioner's only argument (Pet. 4-7) is that the court of appeals erred in not remanding the Section 8(a)(1) violation along with the 8(a)(3) portion of the case. The remand, however, was for the sole purpose of allowing petitioner in its defense to the charge that two employees were discriminatorily discharged to place into the record evidence of its

---

[2]No issue concerning the correctness of this aspect of the case is involved here.

general practices with regard to layoffs and the disciplining of employees for unexcused absences. This evidence is wholly irrelevant to whether petitioner's supervisors violated Section 8(a)(1) by attempting to threaten, restrain, or coerce employees in the exercise of their protected activities. The decision of the court of appeals to enforce the Section 8(a)(1) violation found by the Board was thus a proper factual determination that raises no issue warranting review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
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Assistant General Counsel
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FEBRUARY 1982

DOJ-1982-02

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner, NO. 79-7584

vs. *ORDER*

INTERNATIONAL MEDICATION SYSTEMS, LTD.,
Respondent.

Before: WRIGHT, KENNEDY and ALARCON, Circuit Judges.

Judges Wright and Alarcon have voted to deny the petition for rehearing.

The petition for rehearing is denied.

FILED

AUG 17 1981

RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

NLRB v. *International Medication Systems, Ltd.*, No. 79-7584

KENNEDY, Circuit Judge, dissenting from denial of rehearing:

I concurred in the result on the ground that the sanctions employed here were arbitrary in the circumstances of this case. I cannot agree that an administrative law judge lacks all authority to impose any sanctions for refusal to comply with a subpoena.

Here, the administrative law judge permitted testimony but did not allow cross-examination. That seems to me an invitation to abuse the integrity of the hearing process. Given the essential importance of cross-examination in the adversary system, see *Davis* v. *Alaska*, 415 U.S. 308 (1974), and its explicit statutory recognition in adjudications of this sort, see Administrative Procedure Act, section 7(d), 5 U.S.C. § 556(d) (1976), I think this particular sanction should not have been employed.

I disagree with the majority, however, that the statute which grants jurisdiction to district courts to enforce subpoenas must be read as well to prevent administrative law judges from drawing inferences or imposing other reasonable procedural rules to ensure a proper result in their hearing procedures in circumstances where one party is recalcitrant. The opinion as written seems to me to result necessarily in an increase of actions in the district court and to encourage parties to use this device as a stalling tactic.

Rehearing should therefore be granted so that more careful consideration can be accorded these most important issues.